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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/005,678	12/05/2001	Suzanne Mary Spindler	F3275(C)	9583
201 7590 12/23/2003			EXAMINER	
UNILEVER			BHAT, NINA NMN	
PATENT DEPARTMENT			ART UNIT	
45 RIVER ROAD			PAPER NUMBER	
EDGEWATER, NJ 07020			1761	

DATE MAILED: 12/23/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/005,678

Applicant(s)

SPINDLER ET AL.

Examiner

N. Bhat

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 05 December 2001.
- 2a) ☐ This action is FINAL.
- 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-5 is/are pending in the application.
 - 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-5 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. §§ 119 and 120

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 - a) ☒ All b) ☐ Some * c) ☐ None of:
 - 1) ☒ Certified copies of the priority documents have been received.
 - 2) ☐ Certified copies of the priority documents have been received in Application No. _____.
 - 3) ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 13) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.
 - a) ☐ The translation of the foreign language provisional application has been received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

DETAILED ACTION

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

3. Claims 1-2 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kahn et al.[USP 4,552,773].

Kahn et al. teaches a whipped composition having an overrun between 90-150% wherein at least 50% of the fat is solid beta phase crystalline fat at 0°F, which would obviously imply that rest of the fat would be in the liquid phase at 0°F. The composition is an ice cream composition.

However, Kahn et al. does not teach that the composition has a fat phase, which is liquid at -5°C.

Kahn et al. teaches providing a whipped ice cream or milkshake composition which is shelf stable for 6 months at 0°F wherein at least 50% of the fat phase is solid, which implicitly implies that the rest of the fat is in its liquid phase. The amount of fat

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used in the ice cream preparation is within the range as described by applicant, and further the type of fat being used in the composition include lauric fats, coconut oil, palm kernel oil, babassu oil, palm oil, butter fat and the like.[Note Column 3, lines 5-11]

It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide a composition comprising a fat phase and having overrun of at least 90% wherein at least 50% w/w of the fat is liquid at -5°C from reading Kahn et al. because Kahn et al. does teach providing fats in an ice cream composition in the same proportions and amounts and the same types of fats used by applicant in preparing an ice cream which is stable at 0°F and wherein at least 50% of the fat is solid at this temperature and remains in this condition for 6 months. Thus at least 50 wt% of the fat would be in the liquid phase at 0°F and to because the fats used by Kahn et al. are similar to the fats used by applicant it would reasonably follow to the ordinary artisan familiar with frozen confectionery preparation, that the ice cream would have at least 50wt% of fat in the liquid phase at -5°C which is 23°F thus rendering the invention as a whole obvious to one having ordinary skill in the art at the time the invention was made.

4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

5. Claims 1-5 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-5 of copending Application No. 10/005,677. Although the conflicting claims are not identical, they are not patentably distinct from each other because both applications claim an ice cream or composition comprising a fat phase and having an overrun of at least 90% and wherein at least 50% w/w of the fat is in the liquid phase at -5°C, in the '677, the at least 40% of the fat is in the liquid phase which would read on at least 50wt% thus would have been and obvious optimization of the '678 patent.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patent.

6. Claims 4-5 are free of the prior art. Claims 4-5 are drawn to a process of preparing an ice cream having an overrun of at least 90% and wherein the process comprises aerating a mix comprising a fat phase in a freezer barrel enclosing an internal volume, wherein the internal volume comprises an aeration means which displaces less than 40% of the internal volume where at least 50% w/w of the fat phase is liquid at -5°C has not been taught or fairly suggested singularly or in combination by the prior art.

7. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Kahn et al.'243 teaches a freezer stable whipped ice cream and milk shake food product which has at least 50% of a solid crystalline fat phase at 0°F.

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Desia et al. teaches a stable aerated frozen confection having a high solid fat content at room temperature. Fayard et al. teach a frozen confectionery product having a low fat content and mean ice crystal diameter of 20-60 microns. EP 1 212948 teaches aerated composition process and apparatus using a freezer barrel with an aerating means, which has to displacement volume. Adolphi et al. teaches an aerated frozen product.

8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to N. Bhat whose telephone number is 571-272-1397.

The examiner can normally be reached on Monday-Friday, 9:30AM-6:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703-308-3959. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9310.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-306-5665.


N. Bhat
Primary Examiner
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